

FCC MAIL SECTION

FEDERAL COMMUNICATIONS COMMISSION

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August 28, 1996

DISPATCHED BY

IN REPLY REFER TO:  
1800B3-AED

Charles R. Naftalin, Esq.  
Koteen & Naftalin, L.L.P.  
1150 Connecticut Avenue, N.W.  
Washington, DC 20036

In re: KGMS(FM), Green Valley, AZ  
Good Music, Inc. ("Good Music")  
BPH-950208IF

Dear Mr. Naftalin:

This letter is in reference to the above-captioned minor change "one step" application to upgrade from Channel 246A to Channel 246C2 pursuant to the *Report and Order* in MM Docket 92-159, 8 FCC Rcd 4735 (1993) ("One-Step Order"). The application also proposed to change the effective radiated power, antenna location and antenna height. The application was amended on March 8, 1996 in response to our January 17, 1996 letter. Since the amendment failed to remedy all of the deficiencies addressed in our letter, we are dismissing the application.

The application as originally filed proposed a one-step upgrade. Because the proposed facility site was short-spaced, the applicant proposed a separate allotment reference site.<sup>1</sup> Our January 17, 1996 letter noted that the proposed allotment reference site was short-spaced to three Mexican allotments and one station. Furthermore, because of contour overlap the allotment reference site did not comply with the U.S.-Mexican Agreement. In response to our letter, the March 8, 1996 amendment changed the directional antenna pattern in order to eliminate overlap between the proposed facility and the vacant Mexican allotment on Channel 247B in Sonoita. However, with respect to the proposed allotment reference site the applicant stated "[t]he allotment reference site conforms to the Commission's allotment standards and is not applicable to Mexican stations." This is not correct. The proposed allotment site must be acceptable under the U.S.- Mexican Agreement before the proposed facility site can be considered.

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<sup>1</sup>The application proposed 47 C.F.R. § 73.215 processing to KHTC(FM), Phoenix, Arizona.

The Commission has stated that the nationwide FM allotment scheme is constructed on two core technical requirements: (1) that allotment sites comply with the minimum spacing requirements of § 73.207 and (2) that the allotment must satisfy the community coverage requirements of § 73.315. The goals of the allotment scheme are to prevent overcrowding of FM stations and provide a consistent, fair, efficient, and equitable distribution of FM facilities as required by Section 307(b) of the Communications Act.<sup>2</sup> Further, the Commission has indicated that all applicants using the "one-step" process must satisfy the same allotment requirements as petitioners in an allotment rulemaking proceeding to amend the FM Table of Allotments.<sup>3</sup> Furthermore, the Commission has indicated that where a station seeks modification using the "one-step" process and is unable to demonstrate that a suitable allotment site exists that would satisfy the spacing and community coverage requirements for the station's channel and class, the application would be dismissed.<sup>4</sup> This policy is strictly enforced even where the applicant intends to utilize the more lenient spacing and contour protection requirements of § 73.215. There is no precedent for waiver of the allotment requirements.

The proposed allotment reference site is short-spaced to three Mexican allotments and one Mexican station (XHNGS-FM, Nogales on Channel 244B). With respect to the three allotments it may be possible to limit the KGMS facilities in order to comply with the U.S.-Mexican Agreement. However, the 54 dBu protected contour of XHNGS-FM would encompass the proposed allotment reference site.<sup>5</sup> Therefore, no reduction in facilities would eliminate the overlap caused to XHNGS-FM and the site cannot comply with the U.S.-Mexican Agreement. Furthermore, when considered as an allotment site, the proposed facility site does not comply with the allotment standards because of the short-spacing to KHTC. Accordingly, the application is unacceptable for filing.

In the Commission's letter dated January 17, 1996, it was stated that:

...pursuant to 47 C.F.R. § 73.3522(a)(6), "...an applicant whose application is found to meet the minimum filing requirements but nevertheless is not complete and acceptable shall have the opportunity in the 30-day period specified in the FCC staff's deficiency letter to correct all deficiencies in the tenderability and acceptability of the underlying application, including any deficiency not specifically identified by the staff." Additionally, 47 C.F.R. § 73.3564(a) states that, "[a]pplications with uncorrected tender and/or acceptance defects remaining after the

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<sup>2</sup>See *Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Station Assignments by Using Directional Antennas*, 6 FCC Rcd 5356, 5358 (1991) (para. 13).

<sup>3</sup>See *Amendment of the Commission's Rules to Permit FM Channel and Class Modifications by Application*, 8 FCC Rcd 4735, 4737 (1993) (para.13).

<sup>4</sup>*Id.* at 4737 (para. 14)

<sup>5</sup>Because XHNGS-FM facilities are not limited, pursuant to the U.S.-Mexican Agreement, it must be protected to maximum facilities for a Class B station

opportunity for corrective amendment will be dismissed with no further opportunity for corrective amendment." See Appendix B in the *Report and Order* in MM Docket No. 91-347, 7 FCC Rcd 5074, 57 Fed. Reg. 34872, released July 27, 1992. Accordingly, this letter constitutes your one opportunity for corrective amendment pursuant to 47 C.F.R. § 73.3522(a)(6).

Therefore, Application BPH-950208IF, being unacceptable for filing after the one opportunity for corrective amendment, IS HEREBY DISMISSED. This action is taken pursuant to 47 C.F.R. § 73.3522(a)(6).

Sincerely,

A handwritten signature in black ink that reads "Dennis Williams". The signature is written in a cursive, slightly slanted style.

Dennis Williams  
Assistant Chief  
Audio Services Division  
Mass Media Bureau

cc: Carl T. Jones Corporation  
Good Music, Inc.